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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 458

DIANA KEARNY POWELL, *Petitioner*

v.

NATIONAL SAVINGS AND TRUST COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

NATIONAL SAVINGS AND TRUST COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause May 19, 1964, affirming a judgment of the United States District Court for the District of Columbia entered November 15, 1963.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R-12) is unreported.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Suppl. R-A-1, 7a) is unreported.

The related prior opinion of the United States Court of Appeals for the District of Columbia Circuit, *Powell* v. *National Savings and Trust Company, et al.,* is reported at 111 U.S. App. D.C. 290, 246 F. 2d 412, rehg. en banc den., pet. for cert. den. 368 U.S. 946, 7 L. Ed. 2d 343, 82 S. Ct. 387, pet. for rehg. of pet. for cert. den. 368 U.S. 1005, 7 L. Ed. 2d 547, 82 S. Ct. 597. (1a-7a)

JURISDICTION

Review is sought of the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered May 19, 1964 (Suppl. R-A-1, 7a) on the grounds it violates petitioner's vested rights under Article I, sec. 10 and Amendment 5 of the Constitution of the United States; timely petition for rehearing *en banc* was denied June 19, 1964 (9a). The United States District Court for the District of Columbia had original jurisdiction (R-1). The constitutional question was raised on numerous occasions during the extended proceedings, and in relation to the judgment here sought to be reviewed, (R-12) by timely motion denied prior to final entry in the District Court. Jurisdiction is under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a decision of a United States Court of Appeals—rendered on respondent's misrepresentations in total disregard of appellant's grounds of mistake, deliberate fraud, and unconstitutionality—which af-

firms a United States District Court judgment authorizing a national bank to embezzle the corpus of a terminated trust, distributable in its entirety, and already partly distributed, to the petitioner as sole remainderman in esse,—violates vested rights without due process of law which are protected by guarantees of the Contract Clause and the Fifth Amendment of the Constitution of the United States, this and prior related decisions being predicated upon respondent's misstatement of (1) the wording of the testamentary grant of the remainder; (2) the relevant facts of record; and (3) the settled law of trusts and vesting of future estates, in conflict with decisions of this Court, its own prior decisions, and accepted principles of law everywhere, and 18 U.S.C. 645, 656.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, section 10, of the Constitution of the United States provides, in pertinent part, as follows:

> No State shall . . . pass any . . . law impairing the obligation of contracts.

Amendment 5 of the Constitution of the United States provides, in pertinent part, as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The District of Columbia Code (1961 Ed.) Title 45, 45-812 (Mar. 3, 1901, 31 Stat. 1351, ch. 854, 1022) "Vested and Contingent Future Estates", provides, in pertinent part, as follows:

> A future estate is vested when there is a person in being who would have an immediate right to the possession of the land upon the expiration of the intermediate or precedent estate, or upon the

arrival of a certain period or event when it is to commence in possession. It is contingent when the person to whom or the event upon which it is limited to take effect in possession or become a vested estate is uncertain.

Title 18, U.S. Code, Ch. 31, Sec. 645: "Court officers generally," provides in pertinent part, as follows:

> Whoever, being . . . trustee, or other officer of a United States court, or any deputy, assistant, or employee of any such officer, retains or converts to his own use or to the use of another or after demand by the party entitled thereto, unlawfully retains any money coming into his hands by virtue of his official relation, position or employment, is guilty of embezzlement . . .

Title 18, U.S. Code, Ch. 31, Sec. 656: "Theft, embezzlement, or misapplication by bank officer or employee", provides, in pertinent part, as follows:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, . . . embezzles, abstracts, purloins or willfully misapplies . . . any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; . . .
>
> As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

STATEMENT OF THE CASE

Appeal was timely noted (R-13) to Judgment of the United States District Court entered November 15, 1963 (R-12) over petitioner's objection on the ground it violated her rights under the Contract Clause (P-3) and Fifth Amendment (P-3) of the Constitution of the United States, the substance of which motion is incorporated in the grounds for appeal. Judgment was affirmed on appeal, May 19, 1964 (Suppl. R-A-1, 7a). Timely petition for rehearing *en banc* was denied June 19, 1964 (9a).

Respondent, the National Savings and Trust Company, a national bank, was appointed successor trustee in 1955 by the United States District Court for the District of Columbia, of a now expired trust (R-8) valued at approximately $35,000.00, created under the will of petitioner's grandmother, Diana Kearny Powell, probated in 1905 (R-2-3).

Respondent seeks to reclaim from petitioner, the only remainderman in esse and capable of taking at termination of the trust (R-5), the one-third of the corpus of the estate distributed to her under court order entered April 15, 1959 (R-8-9, 12), and refuses to distribute the remaining two-thirds of the corpus distributable to her as vested remainderman. (R-8-9).

Alleged grounds for respondent's claim are a prior decision, *Powell* v. *National Savings and Trust Company, et al.*, 111 U.S. App. D.C. 290, 246 F. 2d 412, rehg. en banc den., pet. for cert. den. 368 U.S. 946, 7 L. Ed. 2d 343, 82 S. Ct. 387, pet. rehg. of pet. for cert. den. 368 U.S. 1005, 7 L. Ed. 2d 547, 82 S. Ct. 597 (1a-7a), which because of respondent's deliberate misrepresentations to the Court for the purpose of depriv-

ing petitioner of her vested rights and transferring her estate into another trust in the hands of its own agents (R-9), is an absurdity in its misstatement of the facts of record and the settled applicable law (1a-7a).

The decision here sought to be reviewed arbitrarily ignores petitioner's grounds for appeal as completely as though they had not been fully presented to the Court in the appeal (Suppl. R-A-1, 7a), and in conflict with petitioner's constitutional rights and every applicable law and decision (P-3-4), has affirmed the ruling of the District Court (R-12) upon the spurious representations by respondent that petitioner has consented to their fraud (Suppl. R-A-1-2, 7a), notwithstanding her sworn renunciation of their proffer of proceeds of the fraud as a bribe and blackmail. (Suppl. R-B-3).

The prior decision on which respondent relies, *Powell v. National Savings and Trust Company, et al., supra*, (1a-7a), not only misstates the relevant dates and parties in esse (1a-4a), contrary to the facts of record (R-5). It gives color to its patently fallacious reasoning (1a-4a) (R-10) on the basis of respondent's deliberate and repeated misrepresentations of the wording of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Pyne v. Pyne*, 81 U.S. App. D.C. 11, 154 F. 2d 297 (3a), to hold in the instant case that the testamentary grant of the remainder estate, limited to take effect upon termination of the trust by marriage or death of both daughters of testatrix, *the entire estate to be then divided equally* among her children, *the descendants of any who died before the time of division* to take the share of the deceased parent (R-2-4), produced the ridiculous legal effect that *only* those children dying

with surviving issue prior to the time of division were divested of their future interest by death, *but that those dying before the time of division without issue retained their vested interest after death*, held in abeyance until termination of the estate in the trustee, when it was to pass, years after their death, through their several wills to their separate and undetermined estates (3a, R-6, 9-10), instead of through the testamentary grant of the will creating the trust, to the remaindermen designated therein, in esse at termination of the trust (R-3). This ruling is in conflict with the terms of the testamentary grant (R-3), with every applicable authority (4a-7a), the decisions of this Court (P-9) its own prior decisions (P-9), and the applicable statutory provisions in the District of Columbia. (P-3)

The Order sought to be reviewed in effect directs petitioner, a national bank, to embezzle trust property committed to its custody by a United States District Court and held under the supervision of the Court, in violation of the United States Criminal Code, Title 18, Ch. 3, secs. 645 and 656. (P-4)

ARGUMENT

The action of the Courts below in lending the processes of the Court to assist embezzlement by a national bank, in violation of the criminal code of the United States, by misrepresenting the facts and in conflict with applicable decisions, and in violation of petitioner's constitutional rights in vested property guaranteed by the Contract Clause and Fifth Amendment of the Constitution of the United States, is a special and compelling reason for review by this Court.

I.

The decision is in conflict with the facts of record and the testamentary grant.

The National Savings and Trust Company, a national bank, in accepting the successor trusteeship, entered into a contractual obligation with the Court, the life beneficiary Lucy Powell, with petitioner Diana Kearny Powell, only remainderman in esse, and by implication with deceased testatrix, Diana Kearny Powell (grandmother) to administer the estate according to the terms of the will. (R-2-5, 7-10). The trusteeship was administered on the legal presumption that two missing remaindermen, Owen Bullitt Powell and George Cuthbert Powell, were dead without surviving issue, as later investigation proved to be a fact (R-5). Upon this premise, distribution of one-third was made to petitioner, with Court approval, pending determination whether Owen Bullitt Powell and George Cuthbert Powell were living or had surviving issue entitled to share with her the remaining two-thirds (R-8-9). This was the only possible interpretation of the testamentary grant. (R-2-4).

In order to reach its spurious conclusion, the Court had to, and did, misquote the facts of record as to the parties and dates (R-1-5) (1a-4a) as pointed out in petitioner's appeal, which deliberate misstatement both the Court and respondent refused to reconsider or correct, completely ignoring petitioner's appeal. Further, in order to reach its conclusion, the Court had to, and did, misquote the testamentary grant. (1a-4a) (R-2-4).

II.

Respondent's claim, based on a theory inconsistent with its title as trustee, violates petitioner's rights under the Contract Clause of the Constitution.

Respondent, in questioning the title of the remainderman, violated petitioner's rights under the Contract Clause of the Constitution of the United States (P-3) and the decision of this Court in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L.Ed. 629, because in accepting the successor trusteeship, it impliedly agreed to the remainder limited to take effect upon termination of the trust. Its claim to return of the remainder, distributed and distributable to petitioner, is upon the basis of a claim in conflict with its own title as trustee.

III.

The decision, in conflict with the ruling of this Court and Court's own prior decisions in similar cases, violates petitioner's rights under the Fifth Amendment.

The decision of the Court of Appeals deprives petitioner of vested property in violation of Amendment 5 of the Constitution of the United States (R-8), and is in conflict with the ruling of this Court in *Ochoa* v. *Hernandez*, 230 U.S. 139, 57 L.Ed. 1427, 33 S.Ct. 1033. The decision is also in conflict with other decisions of the United States Court of Appeals for the District of Columbia Circuit, including *Jewell* v. *Graham*, 97 App.D.C. 391, 24 F.2d 257, cert. den. 48 S.Ct. 559, 277 U.S. 596, 72 L.Ed. 1006, upheld by this Court, and *Pyne* v. *Pyne*, 81 U.S. App.D.C. 11, 154 F.2d 297, both of which sustain the universally accepted rule of law that a future estate which has not during life vested in possession, as distinguished from a vested present interest already in possession, cannot be conveyed by will, because the deceased remainderman cannot pass

by will an interest which he does not have. In *Pyne* v. *Pyne*, misquoted by the Court of Appeals in the earlier decision in the instant case (3a), the Court of Appeals held

> . . . As the District Court held that John Pyne's interests were indefeasible, it follows that the decree must be reversed.

Respondent found it necessary to pervert logic by misquoting the *Pyne* case in order to give color of legality to its fraud, as did the Court of Appeals in sustaining it in its fraud, thereby compounding misstatement of law (3a, R-7-11) upon misstatement of fact (1a-3a) (R-7-11).

By its own admission, respondent admits in paragraph 6 of its Petition its responsibility for the misstatement (R-9): ". . . counsel advised petitioner [National Savings and Trust Company] that there was a question whether said Diana Kearny Powell was entitled to the whole corpus of the trust estate . . .", *counsel* being the same counsel who for five years as counsel for the trustee of the now expired trust have frustrated distribution under the testamentary grant and who have asked and been allowed by the District Court a fee amounting to more than 20 per cent of the corpus of the estate for their efforts in defeating distribution.

IV.

The decision lends the processes of the Court to perpetrate embezzlement in violation of 18 U.S.C. ch. 31, secs. 645 and 656 (P-4).

Respondent was appointed trustee by, and is responsible to the United States District Court for the District of Columbia, and therefore comes within the definition of "Court officers" under 18 U.S.C. Ch. 31,

sec. 645 (P-4), making embezzlement by a court officer of funds entrusted by order of Court a violation of the United States Criminal Code. Respondent is also a national bank insured under the Federal Deposit Insurance Corporation, and therefore its officers, agents and attorneys come within Section 656, making embezzlement by such agents a criminal offense. (P-4)

For the District Court to sustain the patent fraud of its appointed trustee raises an ugly question of its own implication, and when patent and deliberate fraud and misrepresentation are upheld by a United States Court of Appeals, the integrity of our whole legal system is threatened with collapse.

A decision of such shocking import is a violation of due process of compelling national concern.

V.

Decision based on further misrepresentation to the Court.

In a final attempt at misrepresentation, respondent has falsely represented, and the decision here sought to be reviewed is based on the false representation by respondent (Suppl. R-1, 7a) in complete disregard of petitioner's grounds for appeal and renunciation under oath of the fruits of their fraud as a proffered bribe and attempt at blackmail. (Suppl. R-B-1-3). Petitioner submits that the nature of the blackmail and bribe is no different when embodied in the decision of the United States Court of Appeals, based upon misrepresentation, but is a violation of her rights as set forth in preceding paragraphs.

CONCLUSION

WHEREFORE, Petitioner Diana Kearny Powell respectfully prays that her Petition for Writ of Certiorari for review of the decisions of the United States Court of Appeals for the District of Columbia Circuit based upon fraud and attempted embezzlement should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16071

DIANA KEARNY POWELL, APPELLANT

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor Trustee, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Opinion

Decided July 31, 1961

Miss Diana Kearny Powell, appellant *pro se*.

Mr. Henry H. Paige, with whom *Messrs. Arthur P. Drury, John M. Lynham*, and *John E. Powell* were on the brief, for appellee, National Savings and Trust Company, Successor Trustee.

Mr. Benj. W. Dulany for appellees Anne T. Ogden and Lester H. Sellers, Ancillary Executors of the Estate of Lucy Powell, deceased.

Mr. Nathan Wold entered an appearance for appellee Martha Powell Nistler and certain other appellees.

Before: WILBUR K. MILLER, *Chief Judge*, and PRETTYMAN and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge:* Appellant seeks review of a judgment of the District Court construing a testamentary trust pursuant to a petition of the trustee for instructions.

In 1958 the last surviving of five life tenants of the trust estate died and the appellee trustee was required to

make final distribution under a residuary trust provision contained in a will executed in 1895. Under the terms of the trust one-half of the trust income was given to each of two daughters of testatrix for life or until marriage,

> and upon the marriage or death of both daughters, then *fourthly & finally* to divide the said property *absolutely and in fee*, ..., equally between my children *now* living, viz: the said William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell, the said Aimee Elizabeth Powell and the said Lucy Powell, the descendants of any who may die before the time of division hereinbefore fixed, to have and take the share of their deceased parents, it being my intention that my said daughters shall have the whole of said net income in equal shares so long as they live and are unmarried, and upon the marriage or death of one, the whole shall then be paid to the other until her marriage or death, when the entire property is to be equally divided among my children and the descendants of any deceased child or children *as hereinbefore specified.* (Emphasis added.)

Four of the five children of the testatrix died, without issue surviving, prior to the time of distribution. Appellant is the sole surviving child of William G. Powell, the last survivor of testatrix' five children.

The trustee's request for instructions recited that upon appellant's filing a motion for distribution of the entire estate to herself as the sole surviving descendant of the testatrix, the trustee was unable to determine from the will whether it was to be construed as claimed by appellant or whether it should be construed as giving each of the five children a vested remainder in fee in one-fifth of the trust estate subject to being divested only by his or her death leaving issue prior to the termination of the life estate.

We hold that the will discloses an intent to vest each of the five children with an equal share of the residue "absolutely and in fee," subject only to the life estates

of the daughters on the terms described and subject to being divested only if they predeceased the life tenants and were survived by issue.

In *Pyne* v. *Pyne*, 81 U.S.App.D.C. 11, 154 F.2d 297 (1946), we held that unless both conditions, death of the remainderman during the preceding life estate and survival of issue of the deceased remainderman are met, the remainderman has a vested interest which passes by his will or by statute as the case may be. See also *Scott* v. *Powell*, 86 U.S.App.D.C. 277, 182 F.2d 75 (1950); *Episcopal Eye, Ear and Throat Hospital* v. *Goodwin*, 107 U.S.App.D.C. 375, 278 F.2d 255 (1960).

It is suggested by the dissent that this view ignores the testatrix' express intention which is articulated following the vesting clause "to divide the said property *absolutely and in fee*, . . . equally among my children *now living* . . . ." We hold simply that it would take strong and unequivocal language to negate the use of these classic words of art which have accepted meaning and fixed legal consequences. Read as Judge Prettyman reads it, the second part of the sentence is not an explanation but a repudiation of the vesting clause. It should be noted that the explanation or expression of intent which follows the vesting clause, is in turn qualified by the phrase "as hereinbefore specified" which completes the circle and takes us back to the vesting language "absolutely and in fee."

It is no help in the process of searching for intent to look to unanticipated events to prove that the testatrix could not have meant what she said by the words "absolutely and in fee." Of course she had no way of knowing in 1895 that four of her five children would die without issue. But we cannot predicate our construction of the will on what happened over the 63 years intervening between the date of the will and death of the last of five vested remaindermen. Nor can we give such weight as is urged to the "blood line" argument, for if each of her

children had been survived by one child those children could have freely distributed this property outside the blood line. That events did not develop as the testatrix probably thought they would does not give us freedom to construe her will now as we think she ought to have written it had she been able to peer 63 years into the future.

Affirmed.

PRETTYMAN, Circuit Judge, dissenting: The basic rule of the law of wills, as I understand it, is that the intention of the testator, if it can be ascertained from language in the will, governs. This means what he intended as a matter of practical reality in his own mind, in so far as his words indicate his purpose. That question is devoid of consideration of legalisms and the niceties of judicial semantic ascription.

In the case at bar the testatrix clearly stated her intention that her property was to remain in her own family, with her own descendants. In the last part of the long sentence from which the court quotes in its opinion, she wrote:

> "* * * it being my intention that [if both daughters died or married] the entire property is to be equally divided among my children and the descendants of any deceased child or children as hereinbefore specified."

The purport of that emphasis upon her intention seems to me indisputable. She had in mind, and attempted to make clear, that at the time when the division was appointed to take place, *i.e.*, when the property was rid of its incumbent trust, her property should go to her own children and their descendants, and to no one else. Since that intention is clear, that ends the matter. The property must go as intended.

The court construes the early part of the provision it quotes. It correctly applies the rules of construction. In so far as that part of the provision is concerned, and

in so far as legal rules of construction are concerned, the court, I agree, is correct. The error, it seems to me, is that the court ignores the plain expression of intent in the latter part of the quoted provision. It concludes upon construction that the property should be divided into five parts and then subdivided among the legatees, as signees, or heirs at law of each of the original children. Since four of those children had no descendants, this construction means that four of the five parts go to collaterals, in-laws, or strangers; the only direct descendant of the testatrix or of any of her children gets only one-fifth. This, to my mind, is a far cry from the clear intention of the testatrix, as expressed in the simple and emphatic restatement of her intent quoted above.

This preference of a testator to keep his property in those of his own blood is a usual one. As the Court of Appeals of New York once remarked: "Of two doubtful interpretations, that favoring the blood of the testator rather than strangers will be adopted. Human nature usually so acts."[1]

The legal point I make is that a court does not apply to the language of a will rules designed to give meaning to meaningless expressions, if the court can ascertain from the will the actual intention of the testator, *i.e.*, what the testator really meant to do with his property. Only if the actual intention of the testator cannot be ascertained from the four corners of the will does the law undertake to assign an artificial meaning and result to the words used. Lacking knowledge of actual intent, the courts ascribe by an abstruse system of legalisms a meaning to the will and thus, by a naked fiction, an intention to the testator.

In the learned authorities, such as the *Restatement*,[2] the phrase "judicially ascertained intent" is used, but that

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[1] *In re* Rooker's Will, 248 N.Y. 361, 162 N.E. 283 (1928).

[2] 3 PROPERTY § 241 (1940).

term means, first, what the testator had in mind, judicially ascertained from the language of the instrument. If his actual intent is clearly to be found in the will, the court so finds, and this is the judicially ascertained intent. The *Restatement* says, for example, "The dominant objective of construing a conveyance is to determine the disposition which the conveyor wanted to make."[3] The use of the phrase "judicially ascertained intent" to include a plain purpose indubitably expressed in simple words seems to me to create confusion. But the real meaning of the authorities nevertheless seems to me to be clear.

The cases cited by the court, *Pyne* v. *Pyne*,[4] *Scott* v. *Powell*,[5] and *Episcopal Eye, Ear and Throat Hospital* v. *Goodwin*,[6] do not suggest a different view. In *Pyne* v. *Pyne* we carefully pointed out:

> "The basic, always controlling, rule in the construction of wills is the intent of the testator. If that intent can be discerned in the language of the will, read, of course, in the light of the surrounding circumstances, there is an end to the matter."[7]

We searched that will for "indicia of intent" and then went on to say: "If these indicia of intent within the will be not conclusive, we must ascertain in the meaning which the law attaches to the provision in controversy."[8] We found that the available "indicia of intent" and the law's construction of the terms were the same. In *Scott* v. *Powell* we meticulously searched the whole will and considered its "scheme", and thus ascertained an "evident intent that the property should go to the testatrix's descendants so

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[3] *Id.*, Comment *c*.

[4] 81 U.S. App. D.C. 11, 154 F. 2d 297 (D.C. Cir. 1946).

[5] 86 U.S. App. D.C. 277, 182 F. 2d 75 (D.C. Cir. 1950).

[6] 107 U.S. App. D.C. 375, 278 F. 2d 255 (D.C. Cir. 1960).

[7] 81 U.S. App. D.C. at 14, 154 F. 2d at 300.

[8] 81 U.S. App. D.C. at 15, 154 F. 2d at 301.

long as there were any.'"[9] In *Episcopal Eye, Ear and Throat Hospital* v. *Goodwin*, the problem which arose sixty-three years after the will had been written was obviously not contemplated by the testatrix, and so we laboriously applied the law's rules of construction. All three of those cases were correctly decided, in my judgment. None of them applies to the case at bar. In this latter the actual intent of the testatrix is clear, and we should not belabor the matter. Her intention is all there is to the case.

I would reverse.

(Filed May 19, 1964)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963

No. 18,292

Civil 4051-55

DIANA KEARNY POWELL, *Appellant*,

v.

THE NATIONAL SAVINGS AND TRUST COMPANY, Successor Trustee, *Appellee*.

Before: Bazelon, Chief Judge, and Danaher and McGowan, Circuit Judges.

Order

This appeal, involving an order of the District Court requiring appellant to return personalty distributed to her earlier upon a construction of a will contrary to that sustained by this court in *Powell* v. *National Savings and Trust Company*, 111 U.S. App. D.C. 290, 296 F. 2d 412, *cert.*

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[9] 86 U.S. App. D.C. at 283, 182 F. 2d at 81.

denied, 368 U.S. 946 (1961) (see also *Powell* v. *National Savings and Trust Company*, 114 U.S. App. D.C. 269, 314 F. 2d 274 (1963)), having been heard upon the record and briefs filed in this court, and upon the oral arguments of counsel; and

This court having understood from statements made by counsel for the trustee in the course of oral argument, in response to inquiries made by the court, that, under the distribution to be effected in accordance with the construction of the will made by this court, it appears that appellant will receive (i) one-fifth of the trust estate outright as the only surviving issue of William Glasgow Powell, (ii) a life interest in two-fifths of the trust estate as sole beneficiary under the will of Lucy Powell, to whose estate in turn has passed by testamentary succession the one-fifth interest of Aimee Elizabeth Powell, and (iii) a life interest in one-half of one-fifth of the trust estate as sole beneficiary under the will of Lucy Powell and by reason of the intestate death without surviving issue of George Cuthbert Powell; and the foregoing statement having been submitted to the respective parties, the appellee having confirmed the same, and the appellant notwithstanding, having advised the court of her intention to seek additional relief; it is

ORDERED by this court that the order o. the District Court, filed November 15, 1963, and which is the subject of this appeal, is hereby affirmed.

It is further ORDERED by the court that each party bear its own costs on this appeal.

Per Curiam.

Dated: May 19, 1964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,292 September Term, 1963

Civil Action 4051-55

DIANA KEARNY POWELL, *Appellant,*

v.

THE NATIONAL SAVINGS AND TRUST CO.,

Successor Trustee, *Appellee.*

Before: BAZELON, *Chief Judge*, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, and McGOWAN, *Circuit Judges, in Chambers.*

Order

On consideration of appellant's petition for rehearing en banc, it is

ORDERED by the court en banc that appellant's aforesaid petition is hereby denied.

PER CURIAM.

Dated: June 19, 1964

Circuit Judge Bastian did not participate in the foregoing order.